IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1341

RICHARD LEE FOUKE,

*Petitioner,*

v.

THE STATE OF TEXAS

## PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

MELVYN CARSON BRUDER
Bruder, Helft & Mills
706 Main Street (Suite 300)
Dallas, Texas 75202
214–742-3224

*Counsel for Petitioner*

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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## AUTHORITIES CITED

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The petitioner, RICHARD LEE FOUKE, prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals rendered in this case, the opinion having been delivered on November 26, 1975, and the mandate having been issued on December 12, 1975.

## OPINION BELOW

The opinion of the Court of Criminal Appeals is reported at 529 S.W.2d 772 (1975), and is reproduced at pp. 1a-5a, *infra.*

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). This petition for certiorari was filed less than 90 days after the Court of Criminal Appeals issued the mandate in the case thereby entering that Court's final order in the case.

## QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, the "traditional" rule that the payment of the fine assessed in a misdemeanor case renders an appeal moot is consistent with the Fourteenth Amendment's due process and equal protection guarantees.

2. Whether the Texas statutes which deny someone accused of resisting an arrest or search the defense that the arrest or search was unlawful is consistent with the Fourth Amendment and the Fourteenth Amendment.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.



Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

At 9:30 A.M. on March 10, 1974, Texas highway patrolman Guy Brown observed a vehicle (which the petitioner was driving) travelling at what Brown thought to be an excessive speed – 63 miles per hour in a 55 miles per hour zone. Brown pursued and stopped the petitioner's car. The petitioner left his car and he and Brown engaged in a discussion which became increasingly hostile as it continued. Ultimately Brown ordered the petitioner "to step to the right front of [Brown's] patrol car" "to keep [the petitioner] in [his] sight at all times" while Brown looked at the inspection sticker on the petitioner's car [SF[1] 8]. When the petitioner refused to obey the order, Brown "caught hold of [the petitioner's] left arm and advised him he was under arrest for disobeying a police officer" [SF 16]. As Brown attempted to handcuff the petitioner, the petitioner jerked his arm

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[1] "SF" refers to the Statement of Facts which is the transcript of the court reporter's notes taken during the trial of the petitioner.

away from Brown, started screaming for help, lunged toward the patrol car, and then lunged back toward his car. Two passersby assisted Brown in subduing the petitioner and handcuffing him.

The petitioner was charged with speeding, a violation of art. 6701d § 166,[2] and resisting arrest, a violation of § 38.03 which provides:

> (a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest or search of the actor or another by using force against the peace officer or another.

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[2] Tex. Rev. Civ. Stat. Ann. art. 6701d, § 166 (Supp. 1975), provides in pertinent part:

> Sec. 166. (a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances then existing. Except when a special hazard exists that requires lower speeds for compliance with paragraph (b) of this Section, the limits specified in this Section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this Section or established as hereinafter authorized shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful:

The legal speed limit on the highway on which the petitioner was arrested, viz., the Dallas-Fort Worth Turnpike, on the day of the arrest was 55 miles per hour.



> (b) It is no defense to prosecution under this section that the arrest or search was unlawful.
>
> (c) Except as provided in Subsection (d) of this section, an offense under this section is a Class A misdemeanor.
>
> (d) An offense under this section is a felony of the third degree if the actor used a deadly weapon to resist the arrest or search.

He was convicted of resisting arrest and fined $25.00 on April 16, 1974. Thereafter, on February 25, 1975, the petitioner was acquitted of the speeding charge.

During the trial of the resisting arrest charge, the petitioner presented a defense of unlawful arrest. Following the presentation of evidence but prior to the reading of the court's charge to the jury, the petitioner's trial counsel orally requested the court to instruct the jury on the law relating to the right of a citizen to resist an unlawful arrest. The court refused to do so, citing § 38.03(b).[3] On appeal the petitioner challenged the constitutionality of § 38.03, the constitutionality of the petitioner's arrest and the sufficiency of the evidence, *Appellant's Brief* 5-12, Fouke v. State, No. 50560, Tex. Crim. App., and raised and discussed the mootness issue. *Appellant's First Supplemental Brief* 2-5, Fouke v. State, *id.* The Court of Criminal Appeals concluded the appeal was moot and failed to address the merits of the three contentions advanced in the *Appellant's Brief.*

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[3] See the Statement of Facts of the Hearing on the Motion for New Trial, pp. 2-3.

## REASONS FOR GRANTING THE WRIT

### I

1. *Application of a rule that the payment of a fine assessed in misdemeanor cases renders an appeal moot is not consistent with the Fourteenth Amendment's due process clause, under the circumstances of this case.*

In Sibron v. New York, 392 U.S. 40 (1968), it was said that a state may not effectively deny an accused appellate review under a mootness doctrine where the state is responsible for rendering the appeal moot. *Id.* at 53. This Court particularly recognized that there are 'special' problems involving appellate review of "minor" offenses.

> Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process – in the context or prosecutions for "minor" offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. [Footnote omitted]

*Id.* at 52-53. As is detailed herein, this case presents very important issues relating to fundamental Fourth Amendment guarantees. These issues necessarily arise "at a level of 'low visibility' in the criminal process" because they are confined to misdemeanor offenses. The considerations expressed in the above-quoted portion of *Sibron* are extremely pertinent to this case.

Upon his conviction, the petitioner – a student with limited financial resources – was required to either give bail to



secure his release pending appeal or suffer confinement pending appeal. Had the petitioner elected the confinement alternative, presumably he would have been released after serving a number of days sufficient to satisfy the fine and court costs. At the rate of $5.00 per day credit, (the going rate in Dallas in 1974), the petitioner would have satisfied the judgment long before his conviction could have been reviewed by the Court of Criminal Appeals. Moreover, had he elected the confinement alternative the petitioner faced the possibility of losing both academic credit as well as income at his school due to an inability to attend and lecture in classes. The only other alternative permitted by State law was to post a bond pending appeal. See Tex. Code Crim. P. Ann. art. 44.12 (1965). The cost of such a bond exceeded the cost of the fine and court costs. (Even if the cost of the appeal bond had not exceeded the fine and court costs, such a cost would have been cumulative to the fine and court costs and would have been financially burdensome to the petitioner). Accordingly, the only alternatives available to the petitioner under Texas law enabling him to appeal his conviction did not afford him the opportunity to be free on bond pending appeal without having to pay more for the appeal bond than the amount of the fine and court costs assessed or without having to submit to incarceration which would have rendered the appeal moot, the incarceration time required to satisfy the judgment being far shorter than the time required for the appeal.

Just as the New York law directly prevented Sibron from obtaining his release pending appeal thereby resulting in the completion of his sentence prior to an appeal in the New York courts, the Texas statutory scheme placed the petitioner in an unconscionable dilemma which effectively caused him to satisfy the judgment from which he appealed prior to an appeal to the Texas Court of Criminal Appeals. The

due process clause of the Fourteenth Amendment prohibits the Court of Criminal Appeals from enforcing any law which effectively denies the petitioner an appeal (the appeal being a matter of right in Texas).[4] Douglas v. California, 372 U. S. 353, 356-57 (1963); Griffin v. Illinois, 351 U.S. 12, 17-19 (1956). By holding the petitioner's appeal moot, the Court of Criminal Appeals enforced a legal doctrine which requires an individual convicted of a 'minor' crime to either submit to incarceration or pay more money than the judgment appealed from requires him to pay as a condition of appeal. Such action is not consistent with due process, as exemplified by this Court's holding in *Sibron* denouncing application of a doctrine of mootness where the underlying conditions were State created.

2. *Application of a rule that the payment of a fine assessed in misdemeanor cases renders as appeal moot is not consistent with the Fourteenth Amendment's equal protection clause, under the circumstances of this case.*

By holding that the traditional rule applies in this case – a misdemeanor conviction with only a fine assessed as punishment – but not in cases (whether felony or misdemeanor) where incarceration is assessed as punishment[5] the Court of Criminal Appeals created an unreasonable, arbitrary distinction which resulted in a denial of the petitioner's fundamental rights. The Court of Criminal Appeals held in this case

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[4] Tex. Code Crim. P. Ann. art. 44.02 (1965) provides that "[a] defendant in any criminal action has the right of appeal under the rules hereinafter prescribed."

[5] In Ex parte Langston, 510 S.W.2d 603, 511 S.W.2d 936 (Tex. Crim. App. 1974), and Ex parte Burt, 499 S.W.2d 109 (Tex. Crim. App. 1973), the Court of Criminal Appeals specifically refused to (continued)



that the collateral legal consequences of having been convicted of a crime are more serious in cases where jail time is imposed than in cases where only a fine is assessed. No explanation or rationale is given for this distinction. See 529 S.W.2d 773. There is no legitimate basis for creating or supporting any such distinction. The petitioner's conviction will remain available to challenge his 'good moral character', see Fiswick v. United States, 329 U.S. 211 (1946); it will be available to be used to challenge his reputation for being a peaceable and law-abiding person, see Randolph v. State, 499 S.W.2d 311 (Tex. Crim. App. 1973); and it will be available to be used as evidence against him if he is ever again convicted of a crime. See Moon v. State, 509 S.W.2d 849 (Tex. Crim. App. 1974). These possibilities have been recognized as sufficiently serious collateral legal consequences to preclude application of the traditional rule. Sibron v. New York, *supra* at 55-56. It is irrelevant that the offense under attack is a misdemeanor or a felony; all that matters is that serious collateral consequences will flow from the conviction.

The Court of Criminal Appeals is required to accord everyone convicted in Texas equal protection by the laws, including equal rights and treatment regarding appeals granted as a matter of right. Williams v. Oklahoma City, 395 U.S. 458, 460 (1969), and cases there cited. By allowing Ross Burt the right to attack his misdemeanor conviction after he had satisfied the judgment the court created a precedent consistent with the rule set out in *Sibron*. To deny the petitioner the same right of appellate review which was accorded Ross

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[5] (continued) apply the traditional rule and relied heavily on *Sibron* in holding that a habeas corpus applicant retains his right to challenge a conviction after satisfying the judgment.

Burt is a violation of the petitioner's right to equal protection of the laws (specifically of the statutory right to an appeal), there being no legitimate basis for such a distinction and the disparate treatment accorded the two.

3. *The rule applied in this case by the Court of Criminal Appeals is inconsistent with the rule set out in* **Sibron**; *this court should therefore review the merits of the case under* **Sibron's** *holding.*

*Sibron* holds that there are two exceptions under which this Court will refuse to apply a 'doctrine' of mootness. First, if the accused was unable to "have brought his case to this Court for review before the expiration of his sentence." The Court noted that this exception "was a plain recognition of the vital importance of keeping open avenues of judicial review of deprivations of constitutional right" 392 U.S. at 51-52. "The second exception recognized in St. Pierre [v. United States, 319 U.S. 41 (1943] permits adjudication of the merits of a criminal case where 'under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which has . . . been satisfied.'" *Id.*, at 53-54. The Court discussed the development of the second exception and noted that the 'test for survival' is "'[t]he possibility of consequences collateral to the imposition of sentence . . .'" *Id.*, at 55.

Both exceptions set out in *Sibron* apply in this case. The statutory requirement that a bond be posted pending appeals in Texas in order to avoid confinement, the cost of such an appeal bond, the limited amount of incarceration required to satisfy the judgment in this case and the fundamental nature of the constitutional issue involved in the case all coalesce to yield the conclusion that the petitioner's payment of the fine and court costs in this case was not a voluntary act but was the lesser of the existing evils and that he did



not, by paying the fine and court costs, surrender his right to have his case heard on the merits on appeal.

The Court of Criminal Appeals plainly admitted that some collateral legal consequences were present in the case. However, that court rejected this Court's test set out in *Sibron* that the "possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." *Id.*, at 55. The Court of Criminal Appeals held that the collateral legal consequences present in these case (which appear to be substantially the same as the collateral legal consequences in *Sibron*) were "minimal", and did not justify a departure from the traditional rule. 529 S.W.2d at 773. Under *Sibron* there are ample possible collateral legal consequences of the petitioner's conviction justifying a review on the merits of the constitutional claim.

Even if this Court elects not to require the Court of Criminal Appeals to review the constitutional issue, this Court should review such claim under the rationale of *Sibron* and its predecessors.

## II

The second question presented herein raises fundamental issues relating to the basic guarantees of the Fourth Amendment.

1. *The Fourth Amendment's carries with it the right to reasonably resist an unlawful arrest.*

The Fourth Amendment's mandate is clear: "The right of the people to be secure in their persons . . . against unreasonable . . . seizures shall not be violated. . . ." The State of Texas is required to follow and enforce this mandate. Mapp v. Ohio, 367 U.S. 643 (1961). Thus the Texas Legislature

may not constitutionally make a law which abridges or negates an individual's rights under the Fourth Amendment, Sibron v. New York, *supra*, at 60-61; and the courts of Texas are prohibited from enforcing any law which abridges or negates those rights. Mapp v. Ohio, *supra*. The enactment of § 38.03(b) is in direct conflict with the basic guarantee of the Fourth Amendment that an accused has the right to resist an unlawful arrest. The failure of the Court of Criminal Appeals to so hold compounds the error.

The right to resist an unlawful arrest is a necessary corollary of the Fourth Amendment right to be secure against unreasonable seizure. The right to resist unlawful arrests, tempered by the requirement that such resistance be reasonable, has been recognized by this Court and enforced by this Court since the beginning of this century. In the landmark case of John Bad Elk v. United States, 177 U.S. 529 (1900), this Court held that an arrestee had the right to resist an unlawful arrest so long as he used no more force than was absolutely necessary to repel the assault by the officer attempting the unlawful arrest. Almost fifty years later, in United States v. Di Re, 332 U.S. 581 (1948), this Court said:

> One has an undoubted right to resist an unlawful arrest, and the courts will uphold the right of resistance in proper cases.

*Id.*, at 594. Other courts have reached the same conclusion or have followed this Court's lead. See, *e.g.*, Basista v. Weir, 340 F.2d 74, 82 (3rd Cir. 1965); Abrams v. United States, 237 F.2d 42, 43 (D.C. Cir. 1956); Schook v. United States, 337 F.2d 563, 566 (8th Cir. 1964); and see, *e.g.*, Ely v. State, 139 Tex. Crim. 520, 141 S.W.2d 626 (1940), for an example of the various state court holdings that the right to resist unlawful arrests is a part of state law by virtue of



state constitutional guarantees similar to the Fourth Amendment guarantee against unreasonable seizure.[6]

The enactment of § 38.03(b) emasculated the right to be free from unreasonable seizures by denying one accused of a crime the right to use the time-honored defense that he was the victim of an unconstitutional and unlawful arrest and that the crime with which he is charged is not actionable under penal laws. The Texas Legislature apparently attempted to remove disputes concerning arrests from the streets to the courthouse with the enactment of § 38.03(b); superficially the legislation has a certain amount of appeal in this regard. However, regardless of the purpose of the legislation, the issue at hand remains: Does the legislation square with the Constitution of the United States? The desire to debate the validity of the purpose of § 38.03(b) is tempting. Much can be said about the expense and ignominy to which an individual is necessarily exposed when he is required to submit to an unlawful arrest and seek vindication in the courtroom. But the crux of the matter is that the Fourth Amendment is absolute in its terms regarding the right to be free from unreasonable seizures. It does not require, nor does it admit of a requirement that a citizen submit to an encroachment of the right before that citizen may invoke and enforce that right. The Fourth Amendment permits a

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[6] In *Ely* the Court of Criminal Appeals said:

> The [Texas] Constitution [art. 1, § 19] provides that no citizen shall be deprived of his liberty without due process of the law. Appellant had a right under the law and the Constitution to extricate himself from the illegal arrest and to use such force and such means as were available to him at the time and as appeared to him to be necessary to attain that end.

citizen to resist an arrest in order to enforce the right to be free from unreasonable seizures. To be sure, the citizen who elects to resist bears the responsibility that his action is unlawful if the arrest turns out to be valid. The determinative factor is that the Fourth Amendment permits the citizen to make the election as to the course of conduct he chooses to follow; the State is expressly prohibited from making that election. Under Texas' statutory scheme (of which § 38.03(b) is a part), an individual may never make that election – an individual may never resist an arrest regardless of its validity. Accordingly, in Texas an individual is never secure in his person since he is subjected to being arrested illegally without having the right to resist; to compound the problem, the very act of resisting an unlawful arrest is declared to be an offense. Thus, in Texas, an individual who exercises his Fourth Amendment right to resist an unlawful arrest thereby commits an offense. Surely such a conflict between the United States Constitution and state law cannot be tolerated.

2. *The petitioner was entitled to have the jury instructed on the law relating to the right to resist an unlawful artest but was denied this right by application of § 38.03(b).*

The testimony of both the petitioner and the arresting officer clearly raised the issue of the validity of the arrest and the issue concerning the reasonableness of the resistance offered by the petitioner.[7] Chapter 14 of the Texas Code of Criminal Procedure details the circumstances under which an officer may arrest without a warrant. Officer Brown's

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[7] An example of the testimony raising the issues is:

Q [By the prosecutor] And did [the petitioner] physically resist you when you tried to place him under arrest?

A [By officer Brown] Other than jerking away and running no.

SF. 25.



arrest of the petitioner for 'disobeying a police officer's order' is not included in any of the applicable statutes.[8] The Court of Criminal Appeals has frequently held that arrests for an offense classified as 'disobeying a police officer' are invalid in Texas. Head v. State, 131 Tex. Crim. 96, 96 S.W.2d 981 (1936); Williams v. State, 149 Tex. Crim. 36, 191 S.W.2d 31 (1945). It is therefore arguable that the petitioner was not guilty of resisting arrest *as a matter of law* since the arrest was unlawful under Texas law. But even if the petitioner was not entitled to be found not guilty as a matter of law, at the very least he was entitled to appropriate instructions authorizing the jury to find him not guilty if they found and believed from the evidence that he was resisting an unlawful arrest. This Court has specifically so held in J. Bad Elk v. United States, *supra*, where the conviction was reversed because the trial court failed to give proper instructions covering the law regarding the right to resist an unlawful arrest.

The trial court refused to instruct the jury on the law relating to the right to resist an unlawful arrest not because the issue had not been raised by the evidence, the refusal to give a charge was specifically bottomed on § 38.03(b). The trial court advised the petitioner's trial counsel that he would not charge on the right to resist an unlawful arrest because "under existing law, Section 38.03, *S*ubsection *B*, of the new Penal Code, the Legislature had provided that it is no defense to [a] prosecution for resisting arrest that the arrest made was unlawful." SF – Hearing on Motion for New Trial 2.

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[8] See Appendix B, , *infra*.

Since the testimony of both the petitioner and the officer showed that the arrest in question was effected for 'disobeying an officer's order', the issue of the validity of the arrest was raided by the evidence, there being no offense in Texas known as 'disobeying an officer's order' for which a police officer is permitted to make a warrantless arrest. Inasmuch as there was competent evidence presented which raised the issue of the petitioner's right to resist the arrest because the arrest was unlawful, it was a deprivation of the petitioner's Fourth Amendment rights to deny him the instructions regarding such right since the denial of the instruction effectively denied him the defense of the right to resist an unlawful arrest. See J. Bad Elk v. United States, *supra.*

## CONCLUSION

The Texas Court of Criminal Appeals applied an incorrect rule of 'mootness' in this case, totally inconsistent with the principles announced in *Sibron.* Due process of law and equal protection of the laws requires this Court to either remand this cause for further consideration under *Sibron,* or to proceed to determine the merits of the constitutional issue under *Sibron's* rationale. The importance of the Fourth Amendment question raised in this case precludes application and enforcement of the doctrine of mootness applied by the Court of Criminal Appeals.

Section 38.03(b) of the Texas Penal Code is unconstitutional in that it denies persons accused of resisting arrest their Fourth Amendment right to resist arrests which are unlawful. Application of § 38.03(b) in this case denied the petitioner his right to have the jury instructed on the law relating to the right to resist unlawful arrests and thereby



denied him the right to defend against the charges brought upon the theory that he was the victim of an illegal arrest. The evidence presented during the trial clearly raised the issue; accordingly, the refusal to charge the jury on the law relating to the right to resist an unlawful arrest specifically because of the enactment of § 38.03(b) was a depriviation of the petitioner's Fourth Amendment right to be free from an unreasonable seizure.

This Court should grant certiorari in this case to review the viability of the traditional rule of mootness and to resolve the issue concerning the validity of § 38.03(b).

Respectfully submitted,

MELVYN CARSON BRUDER
BARRY P. HELFT
Bruder, Helft & Mills
706 Main Street, Suite 300
Dallas, Texas 75202
*Attorneys & Counsellors at Law*

## APPENDIX A

772 Tex. 529 SOUTH WESTERN REPORTER, 2d SERIES

Richard Lee FOUKE, Appellant,
v.
The STATE of Texas, Appellee.

No. 50560.

Court of Criminal Appeals of Texas.
Nov. 26, 1975.

Defendant was convicted before the Dallas County Criminal Court, John J. Orvis, J., of resisting arrest, and he appealed. The Court of Criminal Appeals, Dally, C., held that appeal was moot, though there was some minimum collateral legal consequences remaining after defendant paid the costs and $25 fine.

Appeal dismissed.

1. **Criminal Law 87**

County court has concurrent original jurisdiction with justice courts and municipal courts in all prosecutions where a statute does not specifically exclude county court jurisdiction. Vernon's Ann. C.C.P. art. 4.07; Vernon's Ann. St. Const. art. 5, § 16.

2. **Criminal Law 92**

County court has concurrent original jurisdiction with justice and municipal courts over prosecutions for resisting arrest. Vernon's Ann. C.C.P. arts. 4.03, 4.07; Vernon's Ann. St. Const. art 5, § 16.

**3. Criminal Law 1026**

Where accused, who was convicted of resisting arrest, voluntary paid the costs and the $25 fine which had been assessed as punishment for such offense, appeal from conviction was moot, though there were some minimum collateral legal consequences remaining.

**4. Criminal Law 1026**

Voluntary payment of fine in a misdemeanor case renders appeal from judgment in that case moot.–

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Melvyn C. Carson Bruder and Barry P. Helft, Dallas, for appellant.

Henry Wade, Dist. Atty., James B. Scott, Danny Pitzer and Brian Blessing, Asst. Dist. Attys., Dallas, Jim D. Vollers, State's Atty., and David S. McAngus, Asst. State's Atty., Austin, for the State.

OPINION

DALLY, Commissioner.

This is an attempted appeal from a conviction for resisting arrest; the punishment assessed by a jury is a fine of $25.00.

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[1, 2] If it were not moot this Court would have jurisdiction of this appeal. This prosecution was by complaint and information in a County Court at Law. Regardless of the amount of the fine, this Court has jurisdiction of all appeals from county courts when the prosecution is commenced in the county court. Art. 4.03, V.A.C.C.P. The rule is not the same when cases are tried in justice or municipal courts and appealed to the county court; an appeal of these cases may only be taken if the fine assessed in the county court exceeds $100.00. Art. 4.03, V.A.C.C.P. The county court has concurrent original jurisdiction with justice courts and municipal courts in all prosecutions where a statute does not specifically exclude county court jurisdiction. See Art. V, Sec. 16, Constitution of the State of Texas; Art. 4.07, V.A.C.C.P.; *Solon v. State,* 5 Tex. App. 301 (1878); *Woodward v. State,* 5 Tex. App. 296 (1878); *Rose v. State,* 148 Tex. Cr.R. 82, 184 S.W.2d 617 (1945); *Skaggs v. State,* 157 Tex. Cr.R. 195, 247 S.W.2d 906 (1952). In a prosecution for resisting arrest the county court has concurrent original jurisdiction with justice and municipal courts.

[3, 4] This appeal is moot because the appellant has voluntarily paid the fine and costs assessed; he voluntarily elected to satisfy the judgment; there is nothing from which to appeal. It has long been the rule in this state that the voluntary payment of the fine in a misdemeanor case renders the appeal from the judgment in that case moot. See *Payne v. State,* 12 Tex. App. 160 (1882); *Mayes v. State,* 152 Tex. Cr.R. 430, 214 S.W.2d 791 (1948); *Winkler v. State,* 252 S.W.2d 944 (Tex. Cr. App. 1952); *Woodard v. State,* 163 Tex. Cr.R. 634, 295 S.W.2d 659 (1956); *Gates v. State,* 332 S.W.2d 333 (Tex. Cr. App. 1960); *Ex parte Dancer,* 171

Tex. Cr.R. 381, 350 S.W.2d 544 (1961); *Hogan v. Turland*, 430 S.W.2d 720 (Tex. Civ. App. 1968).

On June 14, 1974, at the sentencing hearing, in open court the appellant's counsel, in the appellant's presence, indicated that an appeal to the United States Supreme Court would be taken, but stated that the fine and costs would be paid that day. The transcript contains the court's certificate and a bill of costs showing that the fine and costs assessed were fully paid on June 14, 1974.

We are presented with the question of whether the traditional rule, which has already been stated and which has long prevailed in this state, should be overruled. The traditional rule, the liberal rule, and the federal rule are discussed at length in an annotation in 9 A.L.R.3d 462. The appellant urges that this appeal is not moot because there are collateral legal consequences which remain. He cites and relies upon *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L.Ed.2d 917 (1968); *Fiswick v. United States*, 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196 (1946); *Ex parte Burt*, 499 S.W.2d 109 (Tex. Cr. App. 1973); *Ex parte Langston*, 510 S.W.2d 603 (Tex. Cr. App. 1974). These cases may be distinguished from the case we are now considering in other ways, but certainly they can be distinguished from the case we are now considering because in the cases cited the prison sentences which were imposed and served were not voluntarily accepted; also, the collateral legal consequences were much more severe and imminent. It is true and we recognize that some collateral legal consequences are present in any criminal conviction, but here they are minimal. The benefits of the traditional rule as applied in misdemeanor convictions when fines are voluntarily paid is sufficient for us to refuse to overrule our prior cases; that srule has a salutary effect of ending litigation and avoiding



the necessity for advisory opinions.

The appeal is dismissed.

Opinion approved by the Court.

DOUGLAS, J., not participating.

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## APPENDIX B

### PERTINENT PORTIONS OF CHAPTER 14 TEXAS CODE OF CRIMINAL PROCEDURE

Tex. Code Crim. P. Ann. art. 14.01 (Supp. 1974) provides:

> (a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.
>
> (b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Tex. Code Crim. Proc. Ann. art. 14.02 (1965) provides:

> A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate verbally orders the arrest of the offender.

Tex. Code Crim. Proc. Ann. art. 14.03 (Supp. 1974) provides:

> Any peace officer may arrest, without warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws.



Tex. Code Crim. Proc. Ann. art. 14.04 (1965) provides:

> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is not time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

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